MOTION FILED

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No. 83-586

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

SHELL PETROLEUM N.V.,
Petitioner,
v.

MICHAEL FRANCHETTI, KENNETH CORY, WILLIAM M. BENNETT, Individually and as Members of, and GERALD H. GOLDBERG, Individually and as Executive Officer of, THE FRANCHISE TAX BOARD, STATE OF CALIFORNIA,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

MOTION FOR LEAVE TO FILE BRIEF AND BRIEF OF THE GOVERNMENTS OF BELGIUM, DENMARK, FRANCE, THE FEDERAL REPUBLIC OF GERMANY, GREECE, IRELAND, ITALY, LUXEMBOURG, THE NETHERLANDS, AND THE UNITED KINGDOM (THE MEMBER STATES OF THE EUROPEAN COMMUNITIES) AS AMICI CURIAE

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November 10, 1983

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MOTION FOR LEAVE TO FILE BRIEF FOR THE GOVERNMENTS OF BELGIUM, DENMARK, FRANCE, THE FEDERAL REPUBLIC OF GERMANY, GREECE, IRELAND, ITALY, LUXEMBOURG, THE NETHERLANDS, AND THE UNITED KINGDOM (THE MEMBER STATES OF THE EUROPEAN COMMUNITIES) AS AMICI CURIAE

Pursuant to Rule 42 of the Rules of this Court, the Governments of the member states of the European Communities hereby move this Court for leave to file a brief

as *amici curiae* in this case. Counsel for petitioner has consented to the filing of the attached brief, by a letter that has been filed with the Clerk of the Court. The consent of counsel for respondents was requested but refused.

This Court has indicated that the appropriate way for foreign governments to assert their interests in pending judicial proceedings is through the submission of briefs as *amici curiae.** As set forth in pages 1-3 of the attached brief, the Governments of the member states of the European Communities have a strong interest in the disposition of the petition for certiorari in this case. This motion and the attached brief are timely filed in accordance with Rule 36.1 of the Rules of this Court.

Respectfully submitted,

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November 10, 1983

* *See* Letter from Michael Rodak, Jr. to Wade H. McCree, Jr. (Apr. 17, 1978); Letter from Wade H. McCree, Jr. to Michael Rodak, Jr. (Sept. 6, 1978), in *Zenith Radio Corp. v. United States*, No. 77-589.

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BRIEF OF THE GOVERNMENTS OF BELGIUM, DENMARK, FRANCE, THE FEDERAL REPUBLIC OF GERMANY, GREECE, IRELAND, ITALY, LUXEMBOURG, THE NETHERLANDS, AND THE UNITED KINGDOM (THE MEMBER STATES OF THE EUROPEAN COMMUNITIES) AS AMICI CURIAE

INTEREST OF AMICI CURIAE

This brief is submitted on behalf of the Governments of the member states of the European Communities as *amici curiae*. There are ten member states—Belgium, Denmark, France, the Federal Republic of Germany,

Greece, Ireland, Italy, Luxembourg, the Netherlands, and the United Kingdom. The Netherlands submitted a brief as *amicus curiae* in this case on October 17, 1983. The other nine member states, having subsequently decided also to present their views to the Court, hereby join in the views expressed in the Netherlands brief, with the following further statement in which the Netherlands also joins. The decision below not only will affect the interests of the ten member states, but also may affect their relations with the United States, which of course are based on reciprocity.

The member states of the European Communities are among the major trading partners of the United States.[1] Businesses headquartered in the member states account for over $61 billion—approximately 60 percent—of all foreign direct investment in the United States.[2] Direct investment by U.S. firms in countries of the European Communities totals over $78 billion, or 35 percent of all U.S. direct investment abroad.[3]

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[1] The European Communities comprise three organizations of countries—the European Economic Community, the European Coal and Steel Community, and the European Atomic Energy Community. *See* European Communities, *European Community Facts* 4-8 (1981).

[2] Bureau of Economic Analysis, United States Department of Commerce, *Foreign Direct Investment in the United States in 1982*, 63 Survey of Current Business 31, 36 (Aug. 1983, No. 8). That total investment position is broken down as follows:

	(Millions)
Belgium and Luxembourg	$ 2,424
France	4,671
W. Germany	8,181
Italy	949
Netherlands	21,446
Denmark, Ireland, and Greece	275
United Kingdom	23,334

Id.

[3] Bureau of Economic Analysis, United States Department of Commerce, *U.S. Direct Investment Abroad in 1982*, 63 Survey of Current Business 14, 24 (Aug. 1983, No. 8).

Eight of the other nine member states are parties to treaties with the United States that are similar to the United States-Netherlands Treaty of Friendship, Commerce and Navigation involved in this case ("Netherlands FCN Treaty").[4] The decision below, denying standing to a Netherlands company to invoke the protection of the Netherlands FCN Treaty, seriously weakens the enforceability of each of those treaties and thus threatens the achievement of their important commercial objectives.

In addition, the petition for certiorari raises the issue of the standing of a foreign company to invoke the jurisdiction of U.S. courts to protect rights it asserts under the U.S. Constitution and customary international law. All of the member states have an interest in the resolution of that issue, apart from any treaties they have with the United States.

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[4] *See* Treaty of Friendship, Establishment and Navigation, Feb. 21, 1961, United States-Belgium, 14 U.S.T. 1284, T.I.A.S. No. 5432; Treaty of Friendship, Commerce and Navigation, Oct. 1, 1951, United States-Denmark, 12 U.S.T. 908, T.I.A.S. No. 4797; Convention of Establishment, Nov. 25, 1959, United States-France, 11 U.S.T. 2398, T.I.A.S. No. 4625; Treaty of Friendship, Commerce and Navigation, Oct. 29, 1954, United States-Federal Republic of Germany, 7 U.S.T. 1839, T.I.A.S. No. 3593; Treaty of Friendship, Commerce and Navigation, Aug. 3, 1951, United States-Greece, 5 U.S.T. 1829, T.I.A.S. No. 3057; Treaty of Friendship, Commerce and Navigation, Jan. 21, 1950, United States-Ireland, 1 U.S.T. 785, T.I.A.S. No. 2155; Treaty of Friendship, Commerce and Navigation, Feb. 2, 1948, United States-Italy, 63 Stat. 2255, T.I.A.S. No. 1965, *as amended by* Supplemental Agreement, Sept. 26, 1951, 12 U.S.T. 131, T.I.A.S. No. 4685; Treaty of Friendship, Establishment and Navigation, Feb. 23, 1962, United States-Luxembourg, 14 U.S.T. 251, T.I.A.S. No. 5306; Treaty of Friendship, Commerce and Navigation, Mar. 27, 1956, United States-Netherlands, 8 U.S.T. 2043, T.I.A.S. No. 3942.

The only exception, the United Kingdom, has a commercial treaty with the United States that became effective in 1815. Although its provisions differ from the more recent treaties, it too mandates "reciprocal liberty of Commerce." *See infra* note 11.

SUMMARY OF ARGUMENT

The lower courts' denial of standing to petitioner threatens to vitiate important provisions of the Netherlands FCN Treaty and similar treaties between the United States and eight other members of the European Communities. Under the ruling below, the very entities those provisions were negotiated to protect—companies of one treaty party engaged in gainful pursuit in the territory of the other treaty party—cannot enforce those rights in the courts of the other treaty party. Reciprocal rulings by foreign courts would weaken the ability of American companies to obtain judicial protection for their investments abroad.

The denial of standing to raise claims under the U.S. Constitution and general international law will have equally harmful effects. It will leave foreign parent companies, which bear the ultimate burden of double taxation caused by the unitary method, unable to challenge the lawfulness of that burden.

By preventing adjudication of the lawfulness of state unitary taxation of foreign-based enterprises—and other asserted violations of the reciprocal rights granted under FCN treaties and under international law—the ruling below may discourage mutual trade and investment between the United States and the amici member states. It may also lead other nations to conclude that the United States no longer supports the international consensus that has been built through years of effort in favor of the arm's-length method of taxation. If a denial of review by this Court encourages departures from the carefully established international tax order, all nations that benefit from that order will be harmed, regardless of the nationality of the investors that are immediately affected.

ARGUMENT

Petitioner sought to litigate in the courts below a question of great concern to the Governments of the member states of the European Communities: whether a state of the United States may apply its unitary tax method to the incomes of a foreign parent company, its U.S. subsidiaries, and the parent's affiliates in other foreign countries. The member states of the European Communities have expressed their opposition to that unitary tax approach in five joint diplomatic notes to the U.S. Government since 1980.[5] In those communications, the member states have pointed out that the state unitary approach is incompatible with the arm's-length method of allocating income that is used by the U.S. Government and virtually all other nations. They have argued that, unless all major trading nations employ the same basic method of calculating taxable income, it will be impossible to achieve a coherent framework for international trade and investment. Individual members of the European Communities and other governments, such as those of Canada and Japan, have voiced similar concerns in individual communications to the U.S. Government.[6]

In refusing to adjudicate petitioner's claims, the lower courts raised further issues of concern to the members of the European Communities. The courts ruled that, because petitioner engages in activities in the United States through a U.S.-incorporated subsidiary, it has no standing to challenge California's tax practice, under either the Netherlands FCN Treaty or other applicable laws. That ruling prevents adjudication of the lawfulness of the challenged unitary tax practice; it bars companies of the amici member states from invoking the protection of U.S. courts to vindicate any other constitutional and treaty rights; and it threatens to disrupt the international con-

[5] The notes are reproduced in Annex A to this Brief.

[6] *See* Pet. App. 64a-89a.

sensus respecting the manner in which international business activities are to be taxed.

I. The Ruling Below Threatens To Vitiate Important Provisions of the Nine FCN Treaties Between European Community Countries and the United States

As noted above, nine of the member states of the European Communities have entered into post-war treaties with the United States to establish reciprocal protections for their commercial relations. All eight of the other treaties contain provisions similar to the articles of the Netherlands FCN Treaty that petitioner asserts are violated by California's application of its worldwide unitary tax. And each of the provisions specifically protects "companies of" one treaty party with respect to their investments in the territories of the other treaty party.[7]

By denying petitioner—concededly a "company of" the Netherlands—standing to challenge California's practice under the Netherlands FCN Treaty, the lower courts seriously weakened that treaty and the similar treaties to which the member states are parties. For each treaty, the lower courts' ruling means that, when a company based in a member state of the European Communities engages in trade in the United States through a U.S. subsidiary rather than a branch, that company has no right to invoke U.S. judicial protection for the rights the treaty purports to confer on its investments and enterprises. At the same time, this Court's decision in *Sumitomo Shoji America, Inc. v. Avagliano*[8] appears to deny to the U.S. subsidiary itself any right to invoke the treaty,

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[7] Annex B to this Brief lists the relevant provisions of the nine FCN treaties that are in force between the amici curiae and the United States. The United States has, in all, 21 modern FCN treaties that contain comparable provisions. *See* Brief of the Government of the Kingdom of the Netherlands, Annex C (filed Oct. 17, 1988).

[8] 457 U.S. 176 (1982).

because it is not a "company of" the foreign treaty partner. Whether the asserted harm is impermissible taxation, as here, or another form of unreasonable treatment, the treaty apparently cannot be invoked by the parent or the subsidiary.

Such a rule robs the treaties of much of their effect. Local subsidiaries are, and have long been, the predominant form of direct foreign investment for both U.S. and European firms. In 1982, about 89 percent of all U.S. direct investment in Europe was through locally incorporated affiliates, and 94 percent of all European direct investment in the United States took that form.[9] The treaties purposely and expressly protect the use of local subsidiaries as well as unincorporated branch offices.[10] To deny the protections of the treaties for investments through local subsidiaries on grounds of "standing" thus conflicts with the express language of the treaties. It also frustrates the treaties' purpose of establishing a framework of legal protections for commercial relations between the parties.

The FCN treaties are founded on principles of mutuality and reciprocity. In most respects they extend identical rights and impose identical duties on both sides. If the tribunals of the nine member states that are parties to the FCN treaties were to reciprocate by construing them as narrowly as the courts below, American companies and their subsidiaries in those member states would be unable to enforce their rights under the treaties, and the treaties themselves would become virtual dead letters.[11]

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[9] *See* Bureau of Economic Analysis, United States Department of Commerce, *U.S. Direct Investment Abroad in 1982*, 63 Survey of Current Business 14, 16 at Table 2 (Aug. 1983, No. 8); *Foreign Direct Investment in the United States in 1982*, 63 *id.* at 31, 32 at Table 3.

[10] *See* Netherlands FCN Treaty art. VII(1) and comparable provisions listed in Annex B.

[11] The United Kingdom is the one member state of the European Communities that is not a party to a modern FCN treaty with

II. The Ruling Below Prevents Foreign Companies From Invoking the Protections of the U.S. Constitution and Customary International Law for Their Investments in the United States

The courts below also declined to consider petitioner's claims that California's unitary tax practice violates the U.S. Constitution and customary international law. Although acknowledging that petitioner has alleged injury in fact sufficient to present a justiciable controversy,[12] the courts apparently concluded here too that petitioner, as a "mere shareholder" of its U.S. subsidiaries, did not have standing to sue.

The member states believe that this ruling essentially disregards the injury that California's practice inflicts on petitioner as a foreign-based parent company. California in this case seeks to impose a tax based on the incomes of a Netherlands parent company and its worldwide affiliates—incomes that are not owned either directly or indirectly by the U.S. subsidiaries that are subject to California's jurisdiction. Such a "serious divergence" from the "accepted international practice"[13] will inevitably result in international double taxation, whose effect will

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the United States. The commercial treaty between the two nations dates back to 1815 and lacks the specificity of the more recent treaties. However, it does have an article of establishment, which mandates "reciprocal liberty of Commerce" between the two countries and provides that "generally the Merchants and Traders of each Nation respectively shall enjoy the most complete protection and security for their Commerce but subject always to the Laws and Statutes of the two countries respectively." Convention to Regulate Commerce, July 3, 1815, United States-United Kingdom, art. first, 8 Stat. 228, T.S. No. 110. *See* United States Department of State, *Treaties in Force* 178 (Jan. 1, 1988).

[12] *See* Pet. App. 3a, 16a n.6.

[13] *Container Corporation of America v. Franchise Tax Board*, 108 S. Ct. 2268, 2951-52 (1988); *id.* at 2957 (Powell, J., dissenting).

be felt uniquely by the parent company, not its U.S. subsidiaries. Only the income of the parent is being taxed twice—once in the country where it (or its foreign affiliates) do business, and again in California under the unitary method. The foreign parent therefore should have standing to seek a determination whether California may lawfully tax income that the U.S. subsidiary has not earned and in which it has no ownership interest.

Denial of that standing impairs the security of all foreign investments made in the United States through subsidiaries—with respect to taxation and any other form of governmental action whose lawfulness a foreign company may seek to challenge. And, again, reciprocal rulings by foreign tribunals would weaken the ability of American companies to invoke judicial protection of their investments in foreign lands. Investment in both directions would inevitably be discouraged.

Denying petitioner access to the courts can only exacerbate the international tension created by the unitary tax issue. The prospect that foreign companies will avoid investing in unitary tax states, or remove their investments from such states, is already real.[14] Frustration over the failure to resolve the issue is already leading to proposals for foreign retaliation, such as the bill recently proposed by some members of the British Parliament described in the Netherlands brief.[15] If the rulings below are not corrected, these unfortunate trends may accelerate.

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[14] An executive of Sony Corporation of America has been quoted as saying, "We are seriously considering whether we should move everything that can be moved out of California to South Carolina, where there is no unitary worldwide tax." Lewin, *Unitary Tax Scope Widens*, N.Y. Times, Oct. 18, 1983, at D2, col. 1.

[15] Brief for the Government of the Kingdom of the Netherlands at 15 & n.31 (filed Oct. 17, 1983).

III. The Ruling Below May Disrupt the International Consensus Regarding the Manner in Which International Business Activities Are To Be Taxed

The international community has endeavored for decades to create an international tax system that avoids barriers and distortions and gives adequate protection to international trade and investment. In multilateral discussions since 1928, a consensus has emerged—among developing as well as industrialized countries—in favor of the arm's-length principle of taxation.[16] The member states and the United States have contributed actively to these endeavors.

The unitary approach to taxation of foreign-based enterprises runs counter to this consensus and may be the beginning of its disruption. A refusal by this Court to review the decision below would effectively block any prompt resolution of the underlying question in the American courts. The resulting uncertainty might lead the international community to conclude that the United States has ceased to speak with one voice and thus is no longer contributing to the international tax order toward which the United States, the member states, and other nations have worked for so many years. Some nations—industrialized or developing—may follow California's practice

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[16] Since the League of Nations first began considering methods of allocating income of multijurisdictional businesses in 1928, the model conventions for the avoidance of double taxation adopted by that institution, the Organization for Economic Cooperation and Development, and the United Nations have specifically considered and rejected formula apportionment in favor of the arm's-length method. *See* United Nations, *Model Double Taxation Convention Between Developed and Developing Countries*, arts. 7(2), 9(1), U.N. Doc. ST/ESA/102 (1980); OECD Comm. on Fiscal Affairs, *Model Double Taxation Convention on Income and on Capital*, arts. 5(7), 7(1), 7(2), 9(1) (1977); OECD Comm. on Fiscal Affairs, *Draft Double Taxation Convention on Income and Capital*, arts. 5(6), 7(1), 7(2), 9, OECD Doc. C(63)87 (1963); League of Nations Fiscal Comm., *London and Mexico Model Tax Conventions*, League of Nations Doc. C.88.M.88.1946.II.A. (1946).

if the conflict with the developed international consensus is not resolved soon. Such a danger of disruption of the international consensus through inaction is a matter of great concern to the member states, irrespective of whether the negative impact falls immediately on their own investors in the United States or on U.S. investors in their countries.

CONCLUSION

For these reasons, the member states of the European Communities respectfully submit that this Court should grant the writ of certiorari.

Respectfully submitted,

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November 10, 1983

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ANNEXES

ANNEX A

DIPLOMATIC CORRESPONDENCE FROM THE MEMBER STATES OF THE EUROPEAN COMMUNITIES TO THE U.S. GOVERNMENT CONCERNING STATE UNITARY TAXATION

AMBASCIATA D'ITALIA

Washington, D.C.

The Italian Embassy presents its compliments to the Department of State and, on behalf of the Nine EEC Governments, of which the Italian Government has now the presidency, it has the honor to forward the attached Note on the problems of the unitary method of taxation.

The Italian Embassy welcomes the opportunity to renew to the Department of State the assurances of its highest consideration.

[SEAL]

Washington, D.C.
March 19, 1980

To the

Department of State
Washington, D.C.

UNITARY TAXATION

1. Our Governments are concerned about the application to US subsidiaries of foreign companies of the unitary basis of taxation as applied in California and in varying degrees by certain other States.

2. The unitary basis makes no attempt to examine the profits generated by the subsidiary. It looks to the

total profits of the worldwide operations of the group of which the subsidiary is a part, and claims a portion of those profits on the basis of the assumption that certain specified factors, such as the fixed asset values, turnover and payroll, affect the profits of the subsidiary in the same way and to the same extent as the profits of the group as a whole, irrespective of where the corporations of the group operate. This means that, whenever the group as a whole makes a profit the subsidiary will be taxed on a portion of this profit, even if the subsidiary is actually making a loss, or in the reverse situation, that the subsidiary may not be taxed if the group as a whole has made a loss, although the subsidiary is actually in a profit making position.

3. This method is incompatible with the principles accepted by all OECD member states and recommended to all states as a basis for the taxation of subsidiaries or permanent establishments of foreign enterprises. These principles require that a subsidiary should be taxed only on the profits it actually has made, provided that these are based on dealing at "arm's length" between the subsidiary and related enterprises, i.e. that the transactions between the subsidiary and related corporations are on the same or on a comparable basis as transactions between wholly independent parties. This is intended to arrive at a fair measure of profit and rule out artificial pricing between members of the group for the sole purpose of minimizing tax liability.

4. Unless the same basic rules for calculating taxable profits are followed generally by the main trading nations it will be impossible to achieve the essential objective of providing a consistent and coherent international tax framework for trade and investment.

5. The unitary tax basis can give rise to obviously inequable tax liabilities, and to a form of double taxa-

tion which often cannot be relieved, or can be relieved only if countries, which follow generally accepted practices, bear an unfair burden of relief.

6. Unitary taxation, because it requires worldwide reporting of the group's activities in the state where the subsidiary operates imposes very heavy compliance costs, in addition to the costs of compliance and reporting for non-US corporations in their "home countries".

7. The Federal Government uses the arms-length basis for its taxation of subsidiaries of foreign corporations.

8. The problem was addressed in the US/UK Double Taxation Treaty. Article 9(4) of the Treaty, which was supported by the Administration, would have disallowed the imposition of unitary taxes on subsidiaries of UK companies. When the Senate voted on the Treaty in 1978 the majority approved the Treaty with Article 9(4) in its original form, although the necessary two-thirds majority was not achieved. Subsequently, the Senate approved the Treaty with the necessary two-thirds majority, but subject to the reservation that Article 9(4) was not to apply for the purpose of state taxation. Article 9(4) remained in the Treaty, but only for the purpose of national taxation.

9. There are currently four relevant bills in Congress. S983, S1688, HR 5093 and HR 5076, the last of which is scheduled for hearings on the 31st of March.

In the view of the strong arguments against unitary taxation, our Governments urge you to support this legislation in so far as it relates to the unitary tax issues raised above, with a view to early enactment.

Washington, D.C.
March 19, 1980

Note No. 211

Her Britannic Majesty's Embassy present their compliments to the Department of State and, on behalf of the Ten EEC Governments, of which the British Government has now the Presidency, have the honour to forward the attached Note on the problems of the unitary method of taxation.

The British Embassy avail themselves of this opportunity to renew to the Department of State the assurrances of their highest consideration.

[SEAL]

30 October 1981

BRITISH EMBASSY

WASHINGTON

Attached: Note.

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1. Our Governments are concerned about the application to US subsidiaries of foreign companies of the unitary basis of taxation as applied in California and in varying degrees by certain other States.

2. The unitary basis makes no attempt to examine the profits generated by the subsidiary. It looks to the total profits of the worldwide operations of the group of which the subsidiary is a part, and claims a portion of those profits on the basis of the assumption that certain specified factors, such as the fixed asset values, turnover and payroll, affect the profits of the subsidiary in the same way and to the same extent as the profits of the group as a whole, irrespective of where the corporations of the group operate. This means that, whenever the group as a whole makes a profit the subsidiary will be taxed on a portion of this profit, even if the subsidiary is

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4. Unless the same basic rules for calculating taxable profits are followed generally by the main trading nations it will be impossible to achieve the essential objective of providing a consistent and coherent international tax framework for trade and investment.

5. The unitary tax basis can give rise to obviously inequitable tax liabilities, and to a form of double taxation which often cannot be relieved, or can be relieved only if countries, which follow generally accepted practices, bear an unfair burden of relief.

6. Unitary taxation, because it requires worldwide reporting of the group's activities in the state where the subsidiary operates, imposes very heavy compliance costs, in addition to the costs of compliance and reporting for non-US corporations in their "home countries".

7. The Federal Government uses the arms-length basis for its taxation of subsidiaries of foreign corporations.

8. The problem was addressed in the US/UK Double Taxation Treaty. Article 9(4) of the Treaty, which was supported by the Administration, would have disallowed the imposition of unitary taxes on subsidiaries of UK companies. When the Senate voted on the Treaty in 1978 the majority approved the Treaty with Article 9(4) in its original form, although the necessary two-thirds majority was not achieved. Subsequently, the Senate approved the Treaty with the necessary two-thirds majority, but subject to the reservation that Article 9(4) was not to apply for the purpose of state taxation. Article 9(4) remained in the Treaty, but only for the purpose of national taxation.

9. There are currently two relevant bills in Congress, S 655 and HR 1983.

10. In view of the strong arguments against unitary taxation and the recent extension of its application in New York State, our Governments urge you to support this legislation in so far as it relates to the unitary tax issues raised above, with a view to early enactment.

AMBASSADE DE BELGIQUE

The Embassy of Belgium presents its compliments to the Department of State and, on behalf of the Ten E.C. Governments, of which the Government of Belgium has now the presidency, it has the honor to forward the attached Note on the problems of the unitary method of taxation.

The Embassy of Belgium welcomes the opportunity to renew to the Department of State the assurances of its highest consideration.

Washington, D.C. June 29, 1982

[SEAL]

Attached: Note

The Department of State
Washington, D.C.

UNITARY TAXATION

1. Our Governments refer to their Note on unitary taxation forwarded on their behalf to the Department of State on 30 October 1981 by Her Britannic Majesty's Embassy.

2. Our Governments remain firmly convinced that the unitary basis of taxation with combined reporting, particularly as applied in the international field, is entirely unsatisfactory.

3. As was pointed out in that Note, unless the same basic rules for calculating taxable profits are followed generally by the main trading nations it will be impossible to achieve the essential objective of providing a consistent and coherent international tax framework for trade and investment.

4. Our Governments wish to draw the attention of the State Department to the case of Container Corporation of America vs Franchise Tax Board which we understand is to be heard in the Supreme Court of the United States during the October Term 1982, and urge as a matter of high priority that the Government of the United States should participate in this case as amicus curiae.

EMBASSY OF GREECE
Washington, D.C.

The Embassy of Greece presents its compliments to the Department of State and, on behalf of the Ten European Community Governments, of which the Government of Greece has now the presidency, it has the honor to forward the attached Note on the problems of the unitary method of taxation.

The Embassy of Greece welcomes the opportunity to renew to the Department of State the assurances of its highest consideration.

Washington, D.C., August 1, 1983

Attached: Note

The Department of State
Washington, D.C.

[SEAL]

UNITARY TAXATION

I. Our governments refer to their note on unitary taxation forwarded to the Department of State by the Embassy of Belgium on 29 June 1982.

II. That note drew the attention of the State Department to the case before the Supreme Court of the Container Corporation of America versus the California Franchise Tax Board and urged as a matter of high priority that the government of the United States should participate in that case as amicus curiae. The decision was handed down by the court on 27 June, 1983, and the court found that application of the unitary business principle by the State of California to Container Corporation and its foreign subsidiaries was proper. A majority of justices held that that fact that no brief had been submitted on behalf of the United States government meant there was no indication that the position taken by the government in the

case of the Chicago Bridge and Iron Company still represented its views or that the brief in the Chicago Bridge case applied to the Container case.

III. Although the Supreme Court decision did not apply to US companies with foreign parents, our governments were disappointed by the Container decision. They remain convinced that the unitary basis of taxation with combined reporting, particularly as applied in the international field, is unsatisfactory. Our governments therefore urge that the United States government should give strong support to legislation to ensure that States do not use that method of taxation at least for the subsidiaries of foreign corporations. There are currently two relevant bills in Congress, HR 2918 and S.1225.

IV. It is particularly important that federal legislation should be adopted at an early stage since there are already signs that, following the decision in the Container case, other American States not at present using this method are contemplating adopting worldwide combined reporting.

EMBASSY OF GREECE
Washington, D.C.

The Embassy of Greece presents its compliments to the Department of State and, on behalf of the Ten European Community Governments, of which the Government of Greece has now the presidency, it has the honor to forward the attached Note on the problems of the unitary method of taxation.

The Embassy of Greece welcomes the opportunity to renew to the Department of State the assurances of its highest consideration.

Washington, D.C., September 23, 1983

Attached: Note

The Department of State
Washington, D.C.

[SEAL]

Our Governments refer to their note on unitary taxation forwarded to the Department of State by the Embassy of Greece on August 1st. Since that note was delivered Container Corporation of America has submitted a petition to the Supreme Court of the United States to have its case, originally decided on June 27th, 1983, reheard by the Court.

In its petition, the Container Corporation points out, that a rehearing is necessary to determine the correctness of the Court's assumption—made on the basis that the Administration did not follow up its amicus curiae brief in the case of Chicago Bridge and iron with a further amicus brief in the case of Container Corporation—that the foreign policy of the United States is not seriously threatened by California's decision to apply the unitary business concept. We urge the U.S. Government to submit an amicus brief to the Court now in order to make it clear that this assumption is incorrect, and to

open the way for the Court to agree to a rehearing. This would be an important first step in eliminating world-wide combined reporting as used by several states as a means of taxing multinational corporations, which we hope the Administration will oppose by all the avenues that are open to it.

ANNEX B

COMPARISON BETWEEN PERTINENT PROVISIONS OF NETHERLANDS FCN TREATY AND FCN TREATIES WITH OTHER MEMBER STATES OF THE EUROPEAN COMMUNITIES

	Netherlands FCN Treaty Articles					
	I(1)	VI(3)	VII(1)	XI(1)	XI(3)	XI(4)
Belgium	1	4(2)	6	9(1)	9(3)	9(4)
Denmark	I	VI(4)	VII, VIII	XI(1)	XI(3)	XI(4)
France	I	IV(1)	V(1)	IX(1)	IX(2)	IX(4)
W. Germany	I(1)	V(3)	VII(1)	XI(1)	XI(3)	XI(4)
Greece	I	VIII	XII, XIII	XVI(1)	XVI(2)	XVI(3)
Ireland	V	V	VI	IX(1)(b)	IX(1)(a)	IX(2)
Italy	—	Supp. art. I	II, III	IX(1)(b)	IX(1)(a)	IX(2)
Luxembourg	I	IV(2)	VI(1)	X(1)	X(3)	X(4)

Sources:

1. Treaty of Friendship, Establishment and Navigation, Feb. 21, 1961, United States-Belgium, 14 U.S.T. 1284, T.I.A.S. No. 5432.

2. Treaty of Friendship, Commerce and Navigation, Oct. 1, 1951, United States-Denmark, 12 U.S.T. 908, T.I.A.S. No. 4797.

3. Convention of Establishment, Nov. 25, 1959, United States-France, 11 U.S.T. 2398, T.I.A.S. No. 4625.

4. Treaty of Friendship, Commerce and Navigation, Oct. 29, 1954, United States-Federal Republic of Germany, 7 U.S.T. 1839, T.I.A.S. No. 3593.

5. Treaty of Friendship, Commerce and Navigation, Aug. 3, 1951, United States-Greece, 5 U.S.T. 1829, T.I.A.S. No. 3057.

6. Treaty of Friendship, Commerce and Navigation, Jan. 21, 1950, United States-Ireland, 1 U.S.T. 785, T.I.A.S. No. 2155.

7. Treaty of Friendship, Commerce and Navigation, Feb. 2, 1948, United States-Italy, 63 Stat. 2255, T.I.A.S. No. 1965; Supplemental Agreement, Sept. 26, 1951, 12 U.S.T. 131, T.I.A.S. No. 4685.

8. Treaty of Friendship, Establishment and Navigation, Feb. 23, 1962, United States-Luxembourg, 14 U.S.T. 251, T.I.A.S. No. 5306.